

Iowa Department of Inspections and Appeals  
Division of Administrative Hearings  
Wallace State Office Building, Third Floor  
Des Moines, Iowa 50319

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PATRICIA KELLY and	)	
MICHAEL FISHNICK,	)	
Complainants,	)	DIA No. 14ICRCo09-10
	)	
-and-	)	
	)	
IOWA CIVIL RIGHTS COMMISSION	)	
	)	
v.	)	
	)	
DUBUQUE AERIE #568 OF THE	)	
FRATERNAL ORDER OF THE	)	
EAGLES, a/k/a DUBUQUE	)	
FRATERNAL ORDER OF EAGLES	)	
NO. 568, a/k/a DUBUQUE	)	
ASSOCIATION NO. 568 OF THE	)	
FRATERNAL ORDER OF EAGLES,	)	
an Iowa nonprofit corporation,	)	<b>SUPPLEMENTAL</b>
and STEVE KUHLE,	)	<b>PROPOSED DECISION</b>
Respondents.	)	

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Hearing in this matter was originally held on March 10, 2015. A proposed decision was issued by the undersigned administrative law judge on September 2, 2015. On or about June 3, 2016, this matter was remanded to the undersigned by the Iowa Civil Rights Commission (the Commission) for the limited purposes outlined in its Order to Remand; specifically, the Commission ordered further consideration of these three issues:

1. Complainants' motion to amend the complaint in this matter;
2. The personal liability, if any, of Respondent Steve Kuhle; and
3. A determination regarding whether an award of additional ongoing attorney's fees is warranted.

A limited evidentiary hearing was held on the issues outlined in the Commission's remand order on September 13, 2016. Attorney Katie Fiala represented the Commission. Attorney Robert Sabers represented Complainants Patricia Kelly and Michael Fishnick. Attorney Allan Richards represented Respondents Dubuque

Fraternal Order of Eagles #568<sup>1</sup> and Steve Kuhle. The following witnesses testified: Kaitlin Smith; Michael Fishnick; Patricia Kelly; and Adam Rennison.

Commission Exhibits 1 through 5 were admitted. Complainants' Exhibits 1-R through 24-R were admitted.

Arrangements were made at hearing to hold the record open until September 16, 2016 in order for the Commission to submit the transcript of the March 10, 2015 hearing. The transcript was timely submitted and forms part of the record in this proceeding.

### **FINDINGS OF FACT**

Respondent's legal name is Dubuque Aerie #568 of the Fraternal Order of Eagles. Complainants Michael Fishnick and Patricia Kelly testified that when they initially filed their complaints with the Commission they listed the name of the Respondent entity as Dubuque Fraternal Order of Eagles #568 because that was the name of the entity that appeared on their paystubs. A review of the paystubs issued to employees reflects that the issuing entity is identified as "Fraternal Order of Eagles 568." Payroll detail reports maintained by Respondent identify it as "Fraternal Order of Eagles 568 Aerie." (Fishnick testimony; Exh. 1-R, 6-R, 11-R, Exh. 12).

In response to a questionnaire from the Commission after the complaints were filed, Respondent listed its full legal name as "F.O.E. 568 Eagles." On another questionnaire, Respondent answered this question differently, identifying its full legal name as "Fraternal Order of Eagles 568." In response to a question regarding who owns Respondent, Respondent replied, "Dubuque Aerie 568." Respondent noted that the persons responsible for the information provided in the responses were Larry Lee, Paul Radabaugh, Mike Baumgarten, Steve Kuhle, and Russ Bickle. These individuals were identified as "trustee[s]." (Exh. 16).

After Complainants filed their complaints in these matters, notification was sent to Respondent. The notification named Dubuque Fraternal Order of Eagles #568. When the Commission first filed a Statement of Charges in this matter, it listed Respondents as Dubuque Fraternal Order of Eagles #568 and Steve Kuhle. The Notice of Hearing was addressed to Respondent as Dubuque Fraternal Order of Eagles #568. Respondent's counsel, Allan Richards, filed several pleadings during the course of the proceeding, including a Resistance to Motion to Consolidate, Motion for Additional Time, and Resistance to Motion for Partial Summary Judgment; in each of these

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<sup>1</sup> All references to Respondent in the Supplemental Proposed Decision refer to Respondent Dubuque Aerie #568 of the Fraternal Order of the Eagles, a/k/a Dubuque Fraternal Order of Eagles No. 568, a/k/a Dubuque Association No. 568 of the Fraternal Order of Eagles, an Iowa nonprofit corporation. As discussed more fully herein, Complainants have moved to amend Respondent's name and such motion is granted. The caption reflects the amended name of Respondent. Respondent Steve Kuhle will be referred to by last name.

pleadings, Richards identified himself as counsel for Respondent, who was identified in the case caption as Dubuque Fraternal Order of Eagles #568. During the entire pendency of the contested case proceeding, up to and including the public hearing, Respondent appeared through attorney Richards and never raised the issue of having been improperly named. Respondent also filed a post-hearing brief; the issue of improper naming was not raised in the post-hearing brief. (Exh. 3, 4, 5; Statement of Charges).

A review of documents submitted by Complainants and the Commission reflects that Respondent represented itself by various names in different contexts. The following are names Respondent used during the relevant time period and the context(s) in which they were used:

“Fraternal Order of Eagles, Aerie 568, AKA Dubuque Association No. 568 of the Fraternal Order of Eagles”

- Mortgage dated November 8, 2012 (Exh. 2-R)
- Mortgage dated August 8, 2013 (Exh. 3-R)

“Fraternal Order of Eagles, Aerie 568”

- Promissory Note dated August 8, 2013 (Exh. 24-R)

“Dubuque Association No. 568 of the Fraternal Order of Eagles”

- Quit Claim Deed dated May 28, 2013 (Exh. 4-R)
- Release of Easement dated May 16, 1989 (Exh. 5-R)

Fraternal Order of Eagles 568

- Bank statements (General Fund, 2013) (Exh. 18-R)
- Bank statements (Building & Maintenance Fund, 2013) (Exh. 19-R)
- Bank statements (Benefit Fund, 2013) (Exh. 19-R)
- Bank statements (Social Fund, 2013) (Exh. 20-R)
- Pay stubs

Fraternal Order of Eagles

- Checks (General Fund, 2013) (Exh. 18-R)

Dubuque Aerie No. 568 of the Fraternal Order of Eagles

- Promissory Note dated December 9, 2014 (Exh. 23-R)

At hearing, Respondent's attorney and Respondent's witnesses referred to it in various ways, including "Fraternal Order of Eagles," "Fraternal Order of Eagles in Dubuque," "the Eagles," "the Eagles Club," and "the Eagles organization." Respondent has not pointed to any instance of either its attorney or any of its witnesses referring to it as Dubuque Aerie #568 of the Fraternal Order of Eagles, its legal name, at hearing. This was in stark contrast to the testimony of Adam Rennison, Respondent's current secretary, who testified for Respondent at the evidentiary hearing on remand. Rennison denied knowing about any instances where Respondent has identified itself as anything other than Dubuque Aerie #568 of the Fraternal Order of Eagles, even when confronted with the documents above where Respondent has identified itself as described. (Rennison testimony; Transcript, pp. 12, 30, 33, 65, 95, 100, 101, 116, 140).

### **CONCLUSIONS OF LAW**

#### **A. *Complainants' Motion to Amend***

In an appeal of the proposed decision filed October 6, 2013, Respondents asserted that:

[T]he Fraternal Order of Eagles Aerie #568 and Steve Kuhle do not have authority and is not the Dubuque Aerie #568 of the Fraternal Order of Eagles which is a Non-Profit Organization authorized under a National Charter and Organization and registered as an Iowa Non-Profit Corporation for charitable and benevolent purposes. For this reason alone the cause should not stand as to the real party in interest which has never been named. Iowa Rules of Civil Procedure 1.201, the real party in interest.

On April 7, 2016, the Commission filed a Motion to Substitute Respondent's Corporate Name under Rule 1.201. The Commission requested that the name "Dubuque Aerie #568 of the Fraternal Order of the Eagles" be substituted for "Dubuque Fraternal Order of Eagles #568" as the first Respondent in this case and that the caption be changed to reflect the substitution.

On April 21, 2016, Complainants filed a Motion to Substitute Respondent's Corporate Name under Rule 1.201 and Amend Name of Defendant under Rule 1.402. Complainants joined in the Commission's April 7 motion and, in the alternative, requested that Respondent's name be amended under Iowa Rule of Civil Procedure 1.402(5) to Dubuque Aerie #568 of the Fraternal Order of the Eagles, a/k/a Dubuque Fraternal Order of Eagles No. 568, a/k/a Dubuque Association No. 568 of the Fraternal Order of Eagles, an Iowa nonprofit corporation.

Iowa Rule of Civil Procedure 1.201 provides:

**Rule 1.201 Real party in interest.** Every action must be prosecuted in the name of the real party in interest. But an executor, administrator, conservator, guardian, trustee of an express trust, or a party with whom or in whose name a contract is made for another's benefit, or a party specially authorized by statute may sue in that person's own name without joining the party for whose benefit the action is prosecuted. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Iowa Rule of Civil Procedure 1.402(5) provides:

**1.402(5) Making and construing amendments.** All amendments must be on a separate paper, duly filed, without interlining or expunging prior pleadings. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The Official Comment to Rule 1.402 suggests that courts should construe and enforce procedural rules for speed, justice, economy, and to get at the merits. The Comment goes on:

An example is *Wilson v. Corbin*, 41 N.WS.2d 702. That case points out that a pleading which has gone unchallenged until after the trial, and is then attacked, will be construed as liberally as possible, and aided by every implication and intendment, no matter how remote – whereas if the attack had been sooner made it could not have been so liberally construed. This points to the risk one takes by withholding his attack until after the trial, even when Rules 222 and 243 [now Rules 1.954 and 1.1003] permit it. . . [T]he further a trial has proceeded on the merits, the more a court will attempt to avoid the other aspects of the case.

Complainants argue that this is a case where the amendment seeks to correct a misnomer; in essence, the right party is before the court, albeit under the wrong name. This issue was specifically addressed by the Iowa Supreme Court in *Thune v. Hokah Cheese Company*.<sup>2</sup> In that case, the plaintiff filed an action against the Hokah Cheese Company, as owner of a vehicle involved in a collision with plaintiff. Plaintiff served notice of the action on Willard Potter, who was the sole owner and proprietor of the Hokah Cheese Company. The defendant challenged jurisdiction asserting that the petition did not allege it was a corporation, trade name, or partnership and, as such, it could not be sued as a separate entity. Answers to interrogatories indicated that the vehicle involved in the collision was registered in the name of Hokah Cheese Company. After the issue was raised by defendant, the plaintiff sought leave to amend her petition to indicate that Hokah Cheese Company was the trade name of the business operated by Willard Potter.<sup>3</sup>

The Court cited an annotation to 124 A.L.R. 86-141 which noted that:

[W]here the proper party is before the court, although there under a wrong name, and \*\*\* if the defendant, he is the party the plaintiff intended to sue and did sue, and the court considers such defendant within its jurisdiction, an amendment of process of pleading will be allowed to change or correct the name of \*\*\* defendant to cure the misnomer. In other words, if the right party is before the court, although under a wrong name, an amendment to cure the misnomer will be allowed.<sup>4</sup>

In reversing the trial court's decision not to allow amendment of the pleading, the Court relied upon the fact that the plaintiff brought suit against the registered owner of the vehicle involved in the collision and served notice on the individual who was doing business under that trade name. The Court concluded that the amendment did not amount to a substitution of one party for another after the statute of limitations had run, but simply corrected a misnomer of a party who was "actually before the court at all times under his assumed fictitious name."<sup>5</sup> The Court found that, as long as the real party received proper notice of the action, it was unable to discern any prejudice in permitting that party to be sued under a trade name alone.<sup>6</sup>

In contrast, the Court has distinguished cases of mistaken identity from those involving misnomer. In *Smith v. Baule*, the Supreme Court did not allow amendment after the statute of limitations had run where the plaintiff filed suit against Illinois Central Railroad, an Illinois corporation. The plaintiff sought to amend the caption to substitute

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<sup>2</sup> 260 Iowa 347 (Iowa 1967).

<sup>3</sup> *Id.* at 348-49.

<sup>4</sup> *Id.* at 178.

<sup>5</sup> *Id.* at 351.

<sup>6</sup> *Id.* at 353.

Illinois Central Gulf Railroad, a Delaware corporation, as defendant. Illinois Central Gulf Railroad had merged with Illinois Central Railroad approximately four years prior to the filing and there was no evidence that the individual served with notice of the action was an agent or employee of Illinois Central Gulf Railroad, the Delaware corporation.<sup>7</sup>

Similarly, the Court distinguished *Thune* in *Hickman v. Hygrade Packing Company*.<sup>8</sup> In that case, the plaintiff filed an action against a defendant named as “Hygrade Packing Company Postville, Iowa.” Subsequently, and without serving a second original notice, plaintiff attempted to amend the original notice by changing the name of the defendant to Hygrade Food Products Corporation. Hygrade Food Products Corporation is a New York Corporation with its principal place of business in Detroit, Michigan. It uses the registered trade name “Hygrade’s” on its products.<sup>9</sup> The Court emphasized in the *Hickman* case that the defendant did not do business using the name under which the action was brought. The Court noted that if the defendant had done business under the name under which the action was filed the case would have paralleled *Thune* and plaintiff’s amendment would have been proper.<sup>10</sup> Where the real defendant has been served, some variation or error in the name is not fatal. In analyzing the issue, the Court catalogued cases that involved “nonfatal errors”:

*E.g., Woodruff v. Des Moines Ins. Co.*, 90 Iowa 735, 57 N.W. 592 (‘Des Moines Insurance Company of Des Moines, Iowa’ instead of ‘Des Moines Insurance Company’); *Guzman v. Montgomery Ward & Co.*, 9 Ariz.App. 186, 450 P.2d 427 (‘Montgomery Ward and Company, a retail store’ instead of ‘Montgomery Ward and Company, Incorporated’); *Denver & R.G.R.R. v. Nunez*, 66 Colo. 173, 180 P. 78 (‘Railway’ instead of ‘Railroad’ in corporate name); *Rockey v. Runft*, 191 Kan. 117, 379 P.2d 285 (‘North Central Kansas Electric Cooperative, Incorporated’ instead of ‘N.C.K. Electric Cooperative, Inc.’); *Kantor v. Asbury Park Press*, 116 N.J.L. 379, 184 A. 815 (‘Asbury Park Press, a body corporate of the State of New Jersey’ instead of ‘Asbury Park Press, Inc.’); *Taylor v. Victor Equipment Co.*, 84 Ohio App. 236, 81 N.E.2d 804 (‘Victor Equipment Company, a corporation’ instead of ‘Victor Equipment Corporation’); *O.K. Butler Const. Co. v. Bentley*, 205 Okl. 225, 237 P.2d 886 (‘National Automobile & Casualty Company’ instead of ‘National Automobile & Casualty Insurance Company’); *Arminius Chemical Co. v. White’s Adm’s*, 112 Va. 250, 71 S.E. 637 (‘Incorporated’ omitted from corporate name); *Varney & Evans v. Hutchinson Lumber & Mfg. Co.*, 64 W.Va. 417, 63 S.E. 203 (‘Hutchinson

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<sup>7</sup> 260 N.W.2d 850, 851-54 (Iowa 1977).

<sup>8</sup> 185 N.W.2d 801 (Iowa 1971).

<sup>9</sup> *Id.* at 802.

<sup>10</sup> *Id.* at 804.

Lumber & Manufacturing Corporation’ instead of ‘Hutchinson Lumber & Manufacturing Company’).<sup>11</sup>

Complainants and the Commission argue here that their request to amend Respondent’s name to conform to its correct legal name is similar to the situation the Court confronted in *Thune*, noting that Respondent used the name in the Statement of Charges, Dubuque Fraternal Order of Eagles #568, in its business dealings at various times. Respondent, on the other hand, argued at the evidentiary hearing upon remand that it considers itself unrepresented in this matter and feels it has been severely punished by the neglect of the Commission and Complainants’ attorney.

The position of Complainants and the Commission is the more persuasive here. Respondent meaningfully participated in both the Commission’s investigative process and the administrative hearing process after being notified under a variant of a name it regularly uses in conducting business. Respondent compounded the problem by identifying itself by names other than its legal name in answering the Commission’s questionnaires during the initial investigation. The records in evidence reflect a startling inconsistency in Respondent’s naming in official documents; while its legal name is Dubuque Aerie #568 of the Fraternal Order of Eagles, that name appears rarely on its official documents. Mortgages, bank statements, and promissory notes identify Respondent under a wide array of names. The main commonality between all the names is the presence of the phrase Fraternal Order of Eagles and the number 568.

This was not a situation that involved mistaken identity, as in *Smith* or *Hickman*. The situation here is akin to the one in *Thune*; the proper party was before the tribunal under a misnomer. Respondent failed to attack the Statement of Charges and Notice of Hearing as deficient until after a proposed decision had already been issued by the undersigned administrative law judge. As noted in the official comment to Rule 1.402, where a pleading is unchallenged until after the trial, it will be construed as liberally as possible and aided by every inference in the pleading party’s favor. Respondent took a risk in failing to raise this issue until after the hearing and the issuance of the proposed decision. The real party in interest received proper notice of the action, and there is no evidence that the inadvertent misnaming of Respondent in the Statement of Charges and Notice of Hearing resulted in any prejudice to Respondent. Accordingly, Complainants’ motion to amend Respondent’s name pursuant to Rule 1.402 is granted. Respondent’s name shall be amended to Dubuque Aerie #568 of the Fraternal Order of the Eagles, a/k/a Dubuque Fraternal Order of Eagles #568, a/k/a Dubuque Association No. 568 of the Fraternal Order of Eagles, an Iowa nonprofit corporation. Such amendment shall relate back to issuance of the Statement of Charges and Notice of Hearing in this matter.

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<sup>11</sup> *Id.* at 803-04.



B. *Personal Liability of Respondent Steve Kuhle*

The relevant provision of the Iowa Civil Rights Act of 1965 (“ICRA”) that Respondent Steve Kuhle was found to have violated in the September 2, 2015 proposed decision provides as follows:

1. It shall be an unfair or discriminatory practice for any:
  - a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation.<sup>12</sup>

Steve Kuhle was named as an individual respondent by both Fishnick and Kelly. During the relevant time period, Kuhle was a member of Respondent’s volunteer board of trustees. Additionally, Kuhle was in charge of overseeing and supervising the bartenders who worked at Respondent’s bar, or “social room.” Kuhle had previously been a professional bartender for eight years. It was undisputed at hearing that, generally speaking, the trustees are in charge of hiring and firing bartenders and making personnel decisions. In Kuhle’s capacity as overseer of the bartenders and trustee, he hired at least one bartender without any vote by the trustees. It was Kuhle who decided that Kelly should be switched to the night schedule and that her hours should be reduced from her previous schedule. He made comments about Kelly “slowing down.” Additionally, Kuhle made statements about needing to bring in younger bartenders and “eye candy.” Kuhle voted to terminate Fishnick in the trustees’ meeting where Fishnick’s termination was discussed.

Under Iowa law, a supervisory employee is subject to individual liability for unfair employment practices under ICRA.<sup>13</sup> In making this determination, the Iowa Supreme Court relied upon the language in ICRA referring to a person engaging in unfair or discriminatory practices and ICRA’s provision for a claimant to commence a cause of action for relief against a person, employer, employment agency, or labor organization alleged to have committed a discriminatory or unfair practice.<sup>14</sup> Person is defined under ICRA as “one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the state of Iowa and all political subdivisions

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<sup>12</sup> Iowa Code § 216.6(1) (2016).

<sup>13</sup> *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999).

<sup>14</sup> *Id.* at 873-74.

and agencies thereof.”<sup>15</sup> The Supreme Court also cited Iowa Code section 216.18, which states that ICRA shall be construed broadly to effectuate its purposes.<sup>16</sup>

In his initial appeal to the ICRC after the Proposed Decision was issued, Kuhle argued:

That the decision concludes that Steve Kuhle, individually did these actions, wherein it is clear that his only authority was as a director under a nonprofit charter. That fact that the commission and applicants bring this action individually and him doing business as the Dubuque Fraternal Order of eagles #568, is not the organization that testified as officers and member [sic] of the Dubuque Aerie #568 of the Fraternal Order of Eagles as chartered under law.

In a follow-up appeal brief, Kuhle made the same argument verbatim.

While Kuhle did not reference a statutory citation for his argument, in its response to Respondents’ appeal the Commission cited Iowa Code section 504.901, regarding personal liability for certain individuals acting in specified capacities for nonprofit corporations:

1. Except as otherwise provided in this chapter, a director, officer, employee, or member of a corporation is not liable for the corporation’s debts or obligations and a director, officer, member, or other volunteer is not personally liable in that capacity to any person for any action taken or failure to take any action in the discharge of the person’s duties except liability for any of the following:
  - a. The amount of any financial benefit to which the person is not entitled.
  - b. An intentional infliction of harm on the corporation or the members.
  - c. A violation of section 504.835.
  - d. An intentional violation of criminal law.

The Commission argued that Kuhle could not take advantage of this immunity from liability as he intentionally inflicted harm on the corporation or its members.

No party cited, and the undersigned is unable to find, any case law in which Iowa courts have specifically addressed the question of whether the statutory immunity provided for under Iowa Code section 504.901 applies to exempt non-profit directors, officers, members, or other volunteers from liability for unfair or discriminatory practices under ICRA. The statutory language itself, however, counsels against Kuhle’s argument. In order to make out a claim of disparate treatment under the ICRA, a finding of

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<sup>15</sup> Iowa Code § 216.2(12) (2016).

<sup>16</sup> *Vivian*, 601 N.W.2d at 874.

*intentional* discrimination must be made.<sup>17</sup> The immunity provided for in section 504.901 does not extend to an action taken in the discharge of one's duties that amounts to an intentional infliction of harm on the corporation or its members. Actions that form the basis for a finding of intentional discrimination under ICRA constitute an intentional infliction of harm on the corporation or its members. The corporation is harmed when its directors, officers, members, or volunteers engage in intentional discrimination in the area of employment. Additionally, ICRA is to be construed broadly to effectuate its purposes. Under these circumstances, section 504.901 does not exempt Kuhle from personal liability under ICRA.

### C. *Ongoing Attorney's Fees*

On April 21, 2016, Complainants filed an Application for Additional Attorney Fees and for Express Retention of Jurisdiction for Future Determination of Attorney Fees. In the application, Complainants argue that the attorney's fees of \$12,138.75 awarded in the September 2, 2015 proposed decision were not final attorney's fees as they were awarded only through the day of the hearing. Complainants assert that they have incurred substantial attorney's fees since the date of hearing and likely will incur more in the future. Complainants request that the Commission expressly retain jurisdiction pursuant to 161 Iowa Administrative Code 4.28(1) to determine the actual amount of attorney's fees and to give Complainants' attorney guidance regarding submission of a final bill after a final decision is entered.

#### **161-4.28 (17A) Award of attorney's fees.**

**4.28(1) Retention of jurisdiction.** In any final decision in which it is determined that the complainant is entitled to an award of attorney's fees, but the actual amount has not yet been determined, there is, by operation of this rule, an express retention of jurisdiction of the case by the commission in order to determine the actual amount of attorney's fees to

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<sup>17</sup> See, e.g., *Smidt v. Porter*, 695 N.W.2d 9, 15 (Iowa 2005) ("The question, after all, is simply whether Smidt has introduced sufficient admissible evidence from which a rational trier of fact could find Porter's alleged reasons for her termination were false, and intentional discrimination was the real reason."); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 516 (Iowa 1990) ("In the first stage the employee must establish a prima facie case of intentional discrimination by a preponderance of the evidence."); *Woodbury County v. Iowa Civil Rights Commission*, 335 N.W.2d 161, 168 (Iowa 1983) ("In sum, we cannot find substantial evidence which demonstrates that the reasons offered by the County were merely pretexts for intentional discrimination."); *Wing v. Iowa Lutheran Hospital*, 426 N.W.2d 175, 178 (Iowa App. 1988) ("Plaintiff bears the ultimate burden of persuasion of intentional discrimination and that burden never shifts to the employer.").

which the party is entitled and to enter a subsequent order awarding those fees. The commission shall take this action regardless of whether or not such retention of jurisdiction is expressed in the final decision. In such case, the decision is final in all other respects except the determination of the amount of the attorney's fees.

**4.28(2) Stipulation.** A final decision, in which it is determined that the complainant is entitled to an award of attorney's fees, may provide for an opportunity for the parties to file a written stipulation concerning the amount of the fees to be awarded. Any such stipulation entered into by the complainant(s) and respondent(s) is binding on the commission in the absence of evidence of fraud, wrongdoing, misrepresentation, or evidence that the stipulation is not in accord with the intent of the parties.

**4.28(3) Hearing.** If the amount of attorney's fees is not stipulated to by the parties, the presiding officer shall schedule a hearing on the issue of the amount of the attorney's fees. The hearing shall be governed by the same procedures as a hearing on the merits of a complaint except where otherwise ordered by the presiding officer. The parties may elect, by written stipulation, to utilize some method, such as stipulation of facts of submission of a documentary record, other than or complementary to a hearing, in order to make a record on attorney's fees which may then be reviewed by the presiding officer. By operation of this rule, the commission expresses its consent to such stipulations if agreed to by the parties seeking and contesting attorney's fees. The record of the original hearing is part of the record on the attorney's fee issue. Regardless of the method by which the record is made, the complainant has the burden of persuasion in proving attorney's fees.<sup>18</sup>

It is clear that the Commission's regulations contemplate retention of jurisdiction regarding attorney's fees if a final decision awards attorney's fees but does not determine an actual amount. Respondent did not make any argument at the September 13 hearing against the Commission's retention of jurisdiction to determine attorney's fees.

In this case, Complainants were awarded attorney's fees in the amount of \$12,138.75 in the September 2, 2015 proposed decision. Under the Commission's rules, the proposed decision becomes the final decision of the Commission without further proceedings unless there is an appeal to, or review on motion of, the Commission.<sup>19</sup> In this case, however, Respondents filed an appeal to the Commission. This led to the parties engaging in subsequent briefing and argument to the Commission, which resulted in an

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<sup>18</sup> 161 Iowa Administrative Code (IAC) 4.28.

<sup>19</sup> 161 IAC 4.22(1).

Order of Remand and the evidentiary hearing held on September 13, 2016. During the time frame of Respondents' appeal to the Commission, Complainants incurred additional attorney's fees.

Complainants' attorney submitted an affidavit on the day of hearing, September 13, 2016, attaching a seven page billing statement showing that \$25,077 in attorney's fees was incurred for work on Complainants' cases from April 30, 2012 through September 13, 2016.

It is unknown at this point whether there will be any subsequent appeal to the Commission related to this Supplemental Proposed Decision. As such, the final amount of reasonable attorney's fees recoverable by the Complainants may change. The Commission shall retain jurisdiction, pursuant to 161 Iowa Administrative Code 4.28(1), to award attorney's fees after a final decision is issued. At the point at which a final decision is issued, the parties shall have 30 days to file a written stipulation with the Commission concerning the amount of fees to be awarded, pursuant to 161 Iowa Administrative Code 4.28(2). If the parties fail to file a written stipulation concerning fees within 30 days from the date of the final decision, the Commission shall notify the undersigned so that a hearing on the issue of the amount of attorney's fees may be scheduled pursuant to 161 Iowa Administrative Code 4.28(3).

### **ORDER**

IT IS HEREBY ORDERED that Complainants' motion to amend Respondent's name pursuant to Rule 1.402 is granted. Respondent's name shall be amended to Dubuque Aerie #568 of the Fraternal Order of the Eagles, a/k/a Dubuque Fraternal Order of Eagles #568, a/k/a Dubuque Association No. 568 of the Fraternal Order of Eagles, an Iowa nonprofit corporation. Such amendment shall relate back to issuance of the Statement of Charges and Notice of Hearing in this matter.

IT IS ALSO ORDERED that Respondent Steve Kuhle is not immune from liability for an unfair or discriminatory practice under ICRA pursuant to Iowa Code section 504.901.

IT IS ALSO ORDERED that the Commission retains jurisdiction, pursuant to 161 Iowa Administrative Code 4.28(1), to award attorney's fees after a final decision is issued. At the point at which a final decision is issued, the parties shall have 30 days to file a written stipulation with the Commission concerning the amount of fees to be awarded, pursuant to 161 Iowa Administrative Code 4.28(2). If the parties fail to file a written stipulation concerning fees within 30 days from the date of the final decision, a hearing on the issue of the amount of attorney's fees shall be scheduled.

The Findings of Fact and Conclusions of Law in this Supplemental Proposed Decision supplement the Findings of Fact and Conclusions of Law set forth in the September 2,

2015 Proposed Decision, which is incorporated by reference into the Supplemental Proposed Decision.

Dated this 21st day of November, 2016.



Laura E. Lockard  
Administrative Law Judge

cc: Katie Fiala, ICRC  
Robert Sabers, Attorney for Complainants  
Allan Richards, Attorney for Respondents

### **NOTICE**

Any adversely affected party may appeal this proposed decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.<sup>20</sup> The appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. In addition, the appeal shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.<sup>21</sup>

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.<sup>22</sup>

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<sup>20</sup> 161 IAC 4.23(1).

<sup>21</sup> 161 IAC 4.23(3).

<sup>22</sup> 161 IAC 4.23(2).